From: Nishith Desai Associates
To: Carlton, M.Catherine
Subject: Dispute Resolution Hotline: UK Supreme Court: Security deposit not a pre -condition to challenge enforcement on public policy grounds; April 20, 2017
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Dispute Resolution Hotline

April 20, 2017

UK SUPREME COURT: SECURITY DEPOSIT NOT A PRE -CONDITION TO CHALLENGE ENFORCEMENT ON PUBLIC POLICY GROUNDS

The UK Supreme Court held that:-

- Power to order security is only given to the English courts under Section 103(5) of the English Arbitration Act when challenge proceedings are pending before courts of seat of arbitration;
- Enforcing Courts cannot impose security as a condition to decide issues under the grounds of Public Policy and Arbitrability for resisting enforcement;
- English Procedural rules vest no power to direct payment of security to allow challenge to enforcement of New York Convention Awards

The UK Supreme Court ("**UKSC"**) in its recent ruling of *IPCO (Nigeria) Limited* ("**IPCO**") v. *Nigerian National Petroleum Corporation* ("**NNPC**")[1] held that security cannot be imposed as a condition to hear issues resisting enforcement of the award on grounds of public policy and arbitrability. However, courts may adjourn enforcement in light of on-going setting aside proceedings in the country where the award was made, upon taking appropriate security from the award debtor (which is statutorily prescribed under Section 103(5)) of the English Arbitration Act, 1996 ("**Act**").

FACTUAL BACKGROUND:

NNPC had engaged IPCO to design and construct a petroleum export terminal. Pursuant to certain disputes between the parties under Contract dated March 14, 1994, arbitration proceedings were commenced and an arbitral award was passed in favor of IPCO on October, 2004 ("**Award**"). The Award directed NNPC to pay USD 152,195,971/- and an additional 5 million Naira plus interest at 14% per annum to IPCO.

The overview of the developments that took place between the parties have been summarized below:-

S. No.	Jurisdiction	Date	Nature of Proceedings	Outcome
1.	Nigeria Federal High Court	-	NNPC challenged award on "non-fraud" grounds	Pending
2.	UK High Court of Justice	29 Nov 2004	IPCO filed application for enforcement of award	Justice Steel passed an ex parte enforcement order in favor of IPCO
3.	UK High Court of Justice	27 Apr 2005	Pursuant to the enforcement order being passed, NNPC filed an application for setting aside the 2004 Enforcement Order	NNPC was directed to pay IPCO a sum of $13 million and provide security of $50 million for the adjournment sought. ("**First**

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			based on two grounds under Section 103 (2) and (3) of the Act or alternatively for its enforcement to be adjourned under Section 103(5), pending the resolution of the non-fraud challenges in the Nigerian Courts.	**Security/Adjournment Order**"). This amount was paid and security was duly deposited by NNPC.
4.	UK High Court of Justice	17 April 2008	IPCO challenges decision arguing that Nigerian proceedings will go on for years. IPCO, applied for reconsideration of the First Security/Adjournment Order as it seemed difficult for the Nigerian proceedings to be determined for several years.	IPCO's argument was rejected and it was held that delay was not sufficient to justify complete re-opening of the earlier order. The High Court therefore, directed NNPC to pay a further amount of USD 52m plus USD 26m by way of interest. The High Court gave permission to appeal and stayed the order pending the appeal, conditional upon NNPC providing to the value of USD 30m and adjourned any decision regarding enforcement of the balance of the award under Section 103(5). ("**Second Security/Adjournment Order**"). The additional security was also deposited by NNPC. The Court of Appeal upheld Second Security/Adjournment Order, but it was further stayed pending the outcome of a petition to appeal to the House of Lords.
5.	UK High Court of Justice	16 Dec 2008	NNPC sought to revise the order dated 17 April 2008 on the ground of newly discovered evidence of fraud. The grounds given for refusal of recognition or enforcement were that there had been a material change of circumstances and/or the Court had been misled into believing that the Award had been properly obtained and/or public policy. The ground given for the alternative of adjournment was that the Nigerian courts would or might set aside the Award for fraud, false evidence or forgery.	The High Court stayed the Second Security/Adjournment Order. In light of the new evidence, NNPC was allowed to challenge the enforcement of award on basis of public policy (Section 103(3)) of the Act and for further adjournment of enforcement under Section 103 (5) of the Act. NNPC was directed to maintain the security of $80 million.
6.	Nigeria Federal High Court	27 Mar 2009	NNPC amended its pleadings in the ongoing challenge proceedings in Nigeria to raise the fraud challenge. It came to NNPC's knowledge that the Award was obtained by fraudulent inflation of the quantum of claim using fraudulently created documents by IPCO.	
7.	UK High Court of Justice	17 June 2009	NNPC sought to get the earlier order dated April 17, 2008	By a consent order, NNPC undertook the obligation to

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			modified which directed payments to be made to IPCO.	maintain $80 million security until further notice of the court. NNPC's obligation to pay sums to IPCO was set aside and "*the decision on enforcement of the Award*" was adjourned pursuant to section 103(5) of the Act.
8.	UK High Court of Justice	1 April 2014	IPCO once again made an application seeking enforcement of arbitration award on the basis of a delay in Nigerian proceedings.	Application was dismissed and UK High Court held that even if it had been appropriate to start enforcement proceedings afresh, it would have still dismissed it given that NNPC had a good *prima facie* case of fraud and the same should continue to trial in Nigeria.
9.	UK Court of Appeal	10 Nov 2015	IPCO challenged the order dated 1 April 2014.	The appeal was allowed due to material change in circumstances and ordered:- (1) The proceedings shall be remitted to the Commercial Court for determination as to whether the Award should not be enforced, in whole or in part, because it would be against the English public policy under Section 103(3); (2) Any further enforcement of the Award shall be adjourned, pursuant to Section 103(5) of the Act, pending determination of the Section 103(3) Proceedings; In the event of failure of NNPC to comply with the conditions, the adjournment shall lapse and IPCO may enforce the Award in the same manner as a judgment or Order of the Court and demand payment of the amounts provided by way of security. NNPC was directed to provide a further security of USD 100m in addition to the security already provided under the First and Second Security/Adjournment Order. The parties agreed that not only the fraud issue, but also the non-fraud issues should be decided in the English enforcement proceedings.

RELEVANT PROVISIONS

The entire crux of the matter lies in the interpretation of Section 103 of the Act. The relevant provisions are reproduced hereunder:

A. Section 103(2) (f)

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made." ("***Non-Binding Challenge***")

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B. Section 103(3) of the Act;

*Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award. ("**Public-Policy Challenge**")*

C. Section 103 (5) of the Act;

Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2) (f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

*It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security. ("**Security Provision**")*

CURRENT PROCEEDINGS:

NNPC challenged the 2015 Court of Appeal Order before the UKSC in March, 2017. The issue before the Court was whether NNPC, should have deposited further $100m security in the English enforcement proceedings by reference to Security Provision provided under the Act; and secondly, whether the reference to general English procedural rules was justified.

NNPC challenged the order on the ground that it was passed without jurisdiction or wrong in principle and/or was illegitimate in circumstances. NNPC argued that it has a good prima facie case of fraud entitling it to resist enforcement of the whole award.

IPCO argued that on the basis of the English Procedural Rules and the New York Convention there was nothing in the Act that interfered with the court's general power to make conditional orders, including orders on its own motion. IPCO argued based on joint reading of Article III of the New York Convention and the provisions of the Act applicable to award debtors. Section 70(7) of the Act allows imposition of security in such cases. IPCO also contended that the Court of Appeals by not imposing security on the party (NNPC) challenging the award for Non-binding Award Challenge and Public Policy Challenge, is putting "*substantially more onerous conditions*" on IPCO which is not permitted under the New York Convention.

DECISION AND ANALYSIS:

The UKSC analyzed the provisions in relation to the Non-binding Award Challenge and Public Policy Challenge in light of the Security Provision to determine the issues.

- Non-binding Award Challenge- It is enshrined in Section 103(2) (f) of the Act which provides that an award cannot be enforced in cases where the award has yet not become binding on the parties or is challenged before a competent authority of the country in which it was made.
- Public Policy Challenge- It is enshrined in Section 103(3) of the Act which prohibits enforcement of the award in cases where the matter is not capable of settlement by arbitration or that the award is contrary to the public policy.
- Security Provision- It is enshrined in Section 103 (5) of the Act allows the Court to adjourn proceedings and direct payment of security if an application for the setting aside or suspension of the award has been made to such a competent authority as mentioned in Section 103 (2) (f).

Section 103 (2) and 103 (3) give effect to Article V, while Section 103 (5) gives effect to Article VI, of the New York Convention.

The UKSC held that there was an error in the Court of Appeal's Order as nothing in the Public Policy Challenge provision (or in the underlying provisions of Article V of the New York Convention) provides that an enforcing court can decide an issue pending before it under Section 103 (2) (f) conditional upon payment of security. The UKSC further clarified that with the change in circumstances and decision on issue of fraud being dealt by English Courts itself, any further adjournment or payment of security under Section 103 (5) was misused and misplaced.

The UKSC distinguished the power conferred under Section 103 (5) of the Act. It was clarified that this provision deals with cases where the enforcing court adjourns its own decisions in light of pending proceedings in the foreign jurisdiction where the award was made and direct the debtor to deposit suitable security (on the Non-binding Award Challenge). There is no power under Section 103 (5) to order security except in connection with such an "*adjournment*", which ceased to be applicable when the Court of Appeal held that the fraud challenge should be decided by the Commercial Court. Delays in hearing issues under enforcement before courts are part of decision making process and cannot be interpreted to mean '*adjournment*' as envisaged under Section 103 (5) of the Act.

The UKSC held that the Court of Appeal erred in directing deposit of further security to decide issues under Section 103 (3) and not for adjournment under Section 103 (5) which relates specifically to Section 103 (2) (f) of the Act. It was clarified that courts have no power under Section 103 (3) to make decisions on issues conditional on providing security. This landmark decision clarifies that a Section 103 challenge under the Act, does not entail providing security for the award under the Section 103 (5) of the Act, which is only specific to Section 103 (2) (f) of the Act.

The UKSC rejected IPCO's application of the New York Convention and general rules of English procedure to the present dispute. It observed that the New York Convention was a separate code in itself intended to establish a common international approach. The UKSC was of the opinion that if the right to properly argue or resist enforcement under the Act in enforcement proceedings was made conditional to security, the legislature could and would have done so and as such providing security cannot be used as a means of improving an award creditor's prospects. The Convention reflects a balancing of interests, with a prima facie right to enforce being countered by rights of challenge.

UKSC further clarified that Section 70(7) of the Act was only applicable in cases where the seat of arbitration is in England, Wales or Northern Ireland and it cannot be invoked in international disputes. Further, the power under the said provision is limited to cases where the challenge appears "*flimsy or otherwise lacks substance*" and this was not the case of IPCO. Therefore, the UKSC held that the order for security was not within the scope of any jurisdiction or power conferred on the Court of Appeal by Section 103 of the Act, nor could it be justified by reference to general English procedural rules.

The court's incisive analysis of the various provisions of the Act has accurately balanced the interest of both the parties and has adopted a pragmatic approach. In international disputes, it is crucial that the rights of the creditor be protected but the zeal to protect these rights cannot be at the detriment of the other party. The imposition of additional security, in this case, for arguing fraud issues in the enforcement proceedings would have been an unnecessary financial burden on NNPC. IPCO's own submissions tantamount to imposing 'substantially more onerous conditions' as not only NNPC had deposited a reasonable amount of security in the past but also had a prima facie claim of fraud.

– Mohammad Kamran, Payel Chatterjee & Vyapak Desai
You can direct your queries or comments to the authors

[1] [2017] UKSC 16

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